Supreme Court, U.S.
FILED
MAR 1 1999
OFFICE OF THE CLERK

(5) (4) (4) (4)

No. 98-1026, 98-1028, 98-1039, 98-1052

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

STATE OF WASHINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICI CURIAE OF INNER SOUND CRAB ASSOCIATION, JOE VERDOES, AND WASHINGTON DUNGENESS CRAB FISHERMEN'S ASSOCIATION, TOM KELLEY, IN SUPPORT OF PETITIONER, STATE OF WASHINGTON

DANIEL W. WYCKOFF
Attorney at Law
7425 20th Ave. S.E.
Olympia, WA 98503
(360) 456-5865

TOM D. TOBIN
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580-0730
(605) 842-2500
Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3788

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or affiliates to these Associations which have issued shares to the public.

The Inner Sound Crab Association is a non-profit Washington corporation. Its membership includes major elements of the commercial dungeness crab fishing industry that concentrates its fishing in the waters of Puget Sound.

The Washington Dungeness Crab Fishermen's Association is also a non-profit Washington corporation. Its membership includes major elements of the commercial dungeness crab fishing industry off the coast of Washington.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
A. The Inner Sound Crab Association (ISCA) (Puget Sound)	1
B. Washington Dungeness Crab Fishermen's Association (WDCFA) (Coastal and Adjacent Waters of Pacific Ocean)	3
C. ISCA and WDCFA's Participation in This "Shellfish" Sub-Proceeding	4
D. The Impact of the Decision of the Ninth Circuit Is Substantial	9
REASONS FOR GRANTING THE PETITION	12
I. THE IMPORTANT QUESTION OF WHETHER THE NINTH CIRCUIT RELIED ON THE WRONG STANDARD OF REVIEW TO DECIDE THE MEANING OF HISTORICAL INDIAN TREATIES SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT	12
II. THE IMPORTANT QUESTION OF WHETHER TRIBES HAVE A RIGHT TO HARVEST DEEP-WATER SHELLFISH AND OTHER SPECIES, KNOWN OR NOT KNOWN AT TREATY TIME, FROM PLACES THAT WERE NOT USED BY TREATY TIME INDIANS FOR SUCH HARVESTING, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT	13

TABLE OF CONTENTS—Continued

Page

III. THE IMPORTANT QUESTION OF WHETHER ANY USUAL AND ACCUSTOMED GROUNDS AND STATIONS BEYOND THE THREE-MILE LIMIT OF THE TERRITORIAL SEA RECOGNIZED AT TREATY TIME COULD HAVE BEEN ESTABLISHED OR RECOGNIZED BY THE UNITED STATES, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.... 16

CONCLUSION 20

APPENDIX A

United States v. Washington, 86 F.3d 1499 (9th Cir. 1996) (Kleinfeld, J., dissenting) 1a-6a

APPENDIX B

Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas*, Annapolis, Maryland: Naval Institute Press, (1972) 7a-11a

TABLE OF AUTHORITIES

CASES: Page

Cree v. Waterbury, 78 F.3d 1400 (9th Cir. 1996).. 14
McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991) 10
Mille Lacs Band v. State of Minnesota, 124 F.3d 904 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 2295 (No. 97-1337) (argued Dec. 2, 1998) 13
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 20
Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991) 5, 14
South Dakota v. Bourland, 508 U.S. 679 (1993).... 20
United States v. McConney, 728 F.2d 1195 (9th Cir. 1984) 13
United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978) 15
United States v. Washington, 642 F.2d 1141 (9th Cir. 1981) *cert. denied*, 454 U.S. 862 (1981).... 10
United States v. Washington, 730 F.2d 1314 (9th Cir. 1984) 10, 17
United States v. Washington, 764 F.2d 670 (9th Cir. 1985) 10
United States v. Washington, No. 93-35324 (9th Cir. Nov. 2, 1993) (Memorandum) 6
United States v. Washington, 873 F. Supp. 1422 (W.D. Wash. 1994) 6, 7, 11, 14, 16
United States v. Washington, No. CV-9213, Subproceeding 89-3 (W.D. Wash. Feb. 15, 1995).... 7
United States v. Washington, No. CV-9213, Subproceeding 89-3 (W.D. Wash. Mar. 16, 1995).. 7
United States v. Washington, No. CV-9213, Subproceeding 89-3 (W.D. Wash. Aug. 28, 1995) (Order Re: Implementation of Shellfish Proviso) 17
United States v. Washington, 86 F.3d 1499 (9th Cir. 1996) 1, 8
Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) 10, 11, 12, 20

TABLE OF AUTHORITIES—Continued

STATUTES: Page

61 Fed. Reg. 279 (Jan. 4, 1996) 9, 10
61 Fed. Reg. 28786 (June 6, 1996) 10
RCW 75.30.130 2
RCW 75.30.350 3

OTHER AUTHORITIES:

S.Ct. Rule 37.1 18
S.Ct. Rule 37.6 1
Brief of *Amici Curiae* States of Oregon, *et al.*, *United States v. Washington*, No. 98-1026 (U.S. Mar. 1, 1999) 9
Petition for a Writ of Certiorari, *State of Washington v. United States*, No. 98-1026 (U.S. December 22, 1998) 12, 15
Petition for a Writ of Certiorari, *Puget Sound Shellfish Growers v. United States*, No. 98-1028 (U.S. December 28, 1998) 12
Petition for a Writ of Certiorari, *26 Tideland and Upland Private Property Owners ("UPOW") v. United States*, No. 98-1039 (U.S. Dec. 28, 1998) .. 12, 15
Petition for Rehearing and Suggestion for Rehearing *En Banc*, *United States v. Washington*, No. 95-35446 (9th Cir. July 24, 1996) 8
Brief of Plaintiff-Appellee United States of America, *United States v. State of Washington*, No. 83-3802 (9th Cir. Nov. 18, 1983) 19
Brief of Appellee-Plaintiff Tribes, *United States v. Washington*, 86 F.3d 1499 (9th Cir. 1995) (No. 95-35446) 12, 17
Motion for Intervention of Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association, *United States v. Washington*, No. CV-9213, Sub-proceeding 89-3 (W.D. Wash., Mar. 16, 1995) 7
Transcript of Ruling from Bench, No. CV-9213, Sub-proceeding 89-3 (W.D. Wash. Jan. 27, 1993) 6, 7

TABLE OF AUTHORITIES—Continued

	Page
Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.)	13
Francis Paul Prucha, *The Challenge of Indian History*, Journal of the West, Jan. 1995	9
Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas*, Annapolis, Maryland: Naval Institute Press (1972)	18, 20

BRIEF AMICI CURIAE OF INNER SOUND CRAB ASSOCIATION, JOE VERDOES, AND WASHINGTON DUNGENESS CRAB FISHERMEN'S ASSOCIATION, TOM KELLEY, IN SUPPORT OF PETITIONER, STATE OF WASHINGTON

INTEREST OF AMICI CURIAE[1]

> In twenty-five years, the sea changes, in terms of what creatures are scarce or plentiful in Puget Sound, the technology changes, in terms of how practical it is to fish for one or another creature, and the market changes, in terms of how interested Japanese or American consumers may be in the catch. The eleven-year old child of a halibut fisherman when this lawsuit started in 1970 may now be the thirty-six year old skipper of a crab boat, with a different kind of participation in the industry and different economic interests than his father's. Where a federal district court makes itself a permanent regulatory agency for an industry, it ill behooves the judiciary to exclude people who earn their living in the industry from being heard on how they shall be regulated, on the ground that they did not complain about other decisions at an earlier time.

United States v. Washington, 86 F.3d 1499, 1508 (9th Cir. 1996) (Kleinfeld, J., dissenting). *See Amici* Add. at 3a-4a.

A. The Inner Sound Crab Association (ISCA) (Puget Sound).

ISCA is a non-profit Washington corporation. Mr. Joe Verdoes is the elected President of the Association. ISCA includes, in its membership, all major elements of the

---

[1] Pursuant to S. Ct. Rule 37.6, this brief was authored, in its entirety, by counsel for *Amici Curiae*, Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association. No other person or entity other than *Amici Curiae* made any monetary contribution to the preparation or submission of this brief.

The written consent of all parties is submitted with this brief.

non-treaty commercial dungeness crab fishing industry within Puget Sound. There are approximately 220 persons holding commercial crab limited entry licenses for these areas. The Crab License Moratorium Law, RCW 75.30.130, prohibits new recruitment to the industry. The majority of the active fishermen were members of ISCA before this litigation. Some Indian crab fishers also participated in the fishery under more or less uniform regulations. Because limited entry permits for the fishery were transferrable, those permits had real and substantial value. In light of the recent rulings, the income generated under each permit has declined significantly.

ISCA members have small family businesses. Fishermen make a significant investment to participate in the Puget Sound commercial dungeness crab fishery. Most have invested tens of thousands of dollars in their vessels, necessary crab pots and related gear (some more than $100,000). In the 1990's, their livelihood and that of their families and their small coastal communities has depended largely upon this fishery, particularly because of the fate of salmon in the Washington area.[2]

The dungeness crab season for licensed commercial fishermen ordinarily runs from October 1 through April 15 in Puget Sound. In Puget Sound, the majority of dungeness crab molt in late spring. Molting crab are subject to increased mortality if handled before their shells harden in late summer (as is now the case for treaty fishers who target the crab during the molting season). The fall opening is scheduled to assure that the crabs are filled with meat and have attained their highest market-

---

[2] Many coastal fishing communities are, by definition, single industry communities. As a result, the burdens imposed by this case will not be shared by all citizens of the State. Instead, they are borne by association members (and other fishers) and these small communities. As a practical matter, they have no real voice in the political process.

ability and resistance to handling mortality before the season.

A majority of the Puget Sound dungeness crab are taken in the first few weeks of the season. This crab fishery, because of its local resident nature, requires a management plan that makes uniform regulation its guiding principle.[3]

Treaty fishers in Puget Sound dispute established biology with respect to crab molting mortality. Accordingly, the treaty season is all year long (and exclusive in some areas). This "co-management" has resulted in a decrease in ISCA income of approximately sixty percent (60%) per permit.

B. Washington Dungeness Crab Fishermen's Association (WDCFA) (Coastal and Adjacent Waters of Pacific Ocean).

WDCFA is also a non-profit Washington corporation. Mr. Tom Kelley is the President of the Association. WDCFA includes all major elements of the commercial dungeness crab fishing industry off the coast of Washington. There are approximately 240 non-Indian commercial crab fishermen harvesting dungeness crab in this ocean area. A substantial number of these active fishermen are members of WDCFA. In 1995, the State of Washington passed legislation limiting entry into the coastal dungeness crab fishery effective January 1, 1995. RCW 75.30.350. The limited entry licenses are transferrable and have a market value. Although only few transfers occur, the value of the license is substantial. In light of the ruling of the Ninth Circuit, license values have declined. Fishing seasons have faced increasing restrictions.

---

[3] The marketing of a substantial amount of undersized crab has recently been documented and confirmed in the State of Hawaii and in the State of Washington. Everyone agrees that such a practice will rapidly destroy the crab fishery. To date, non-treaty crabbers have not been implicated in the investigation.

As in ISCA, most WDCFA members have participated in the commercial crab fishery off the coast of Washington for decades. Many have participated in the fishery for generations. Their livelihoods have also become particularly dependent upon this fishery because of the fate of salmon in the Washington area. Moreover, the nature of the industry in these coastal waters requires significant investments in vessels and necessary crabbing equipment, often hundreds of thousands of dollars. Several families and their resources are dependent on the operation of these businesses.

In coastal waters, as in Puget Sound, the dungeness crab stock is a resident population. In coastal waters, the crab mature at three to four years. The traditional coastal dungeness crab season for licensed commercial fishermen runs from December 1 through September 15 of each season. In these waters, the fall closure is necessary because most dungeness crab molt in late summer and are subject to increased mortality if handled before their shells harden in mid-winter. The December 1 opening is scheduled to assure that crabs are filled with meat and have obtained their highest marketability and resistance to handling mortality before fishing begins. In other words, the coastal crab season differs from the Puget Sound season because crab in Puget Sound molt earlier.

As in Puget Sound, this crab fishery, because of its local resident nature and fluctuating returns of harvest, also requires a management plan of uniform regulations.

C. ISCA and WDCFA's Participation in This "Shellfish" Sub-Proceeding.

In 1991, sixteen Indian tribes with reservations on Puget Sound were permitted to bring a sub-proceeding seeking a right to harvest shellfish throughout Puget Sound. The background for shellfish litigation was set forth in *Romero v. Kitsap County*:

In one of his subsequent decisions, Judge Boldt stated:

> 'In order to be entitled to exercise off-reservation treaty fishing rights to nonanadromous fish and *shellfish,* any tribe party to this case shall, *prior* to any attempt to exercise such rights, present *prima facie evidence* and *arguments* supporting its claim to treaty entitlements to such nonanadromous fish and shellfish upon which the *court* may make a *preliminary determination* as to the tribe's entitlement to such *species,* pending final determination of tribal treaty-right entitlement to nonanadromous fish and shellfish. . . .'

Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991) (emphasis added).

Prior to any substantive ruling, ISCA moved in a timely fashion to intervene in these proceedings. This motion to intervene, as well as other motions of the parties, was not acted upon by the court, and the case stayed in this posture for more than a year.

Sixteen months later, in January, 1993, the Honorable Edward Rafeedie held a pretrial conference in Seattle, Washington. In the process of disposing of numerous matters, Judge Rafeedie ruled from the bench that the pending motions to intervene would be denied, including the motion of ISCA. The court held that the interests of the applicant/intervenors were adequately represented by others. The judge's personal view of intervention was articulated at the hearing:

> [I]n general that I am not in favor of a whole lot of intervention for the reason that it clutters up the case. It administratively makes it very difficult to administer, inundates the Court with papers, and my experience has been, and even in this case, that intervention really produces very little contribution.

Tr. of Ruling from Bench at 3-4, No. CV 9213, Subproceeding 89-3 (W.D. Wash. Jan. 27, 1993).

ISCA was given the right to file an *amicus curiae* position. Most importantly, the district court expressly stated that "they may have the right to seek intervention if the posture of the case changes in a *critical* way some time in the future." Tr. of Ruling from Bench at 11-12.

With this assurance from the district court, ISCA did not appeal this order denying intervention. The 26 Tideland and Upland Property Owners did, and that appeal was resolved in their favor on November 2, 1993. *United States v. Washington*, No. 93-35324 (9th Cir. Nov. 2, 1993) (Memorandum). The Ninth Circuit reversed the order of the district court and remanded the issue. The 26 Tideland and Upland Property Owners were then allowed to intervene.

In the interim, in August, 1993, the district court granted the tribes' summary judgment motion that shellfish are fish, holding that the "right of taking fish" in the Stevens Treaties, included the right to take shellfish. But even so, in November, 1993, the district court noted that in its view, the appeal of the Property Owner applicants for intervention was "*premature,*" expressly reiterating that "the denial of intervention was made without prejudice to renew. . . ."

Later in the proceedings, two ocean coastal tribes, the Quileutes and the Hohs, started signing on to tribal pleadings. Previous to this time, as the court noted, "*they were not active participants, and they sought no relief.*" *United States v. Washington,* 873 F. Supp. 1422, 1527 n. 1 (W.D. Wash. 1994) (emphasis added). App. 51.[4]

---

[4] In this *amici curiae* brief, all references to "App. ——" refer to the Joint Appendix to the Petitions filed in this Court. All

In addition, the State signed a "Stipulation" with the Quinault Indian Nation on February 15, 1995. That stipulation provided that the State of Washington and the Quinault Indian Nation would *retrospectively* be "jointly bound by the Court's interpretation of the Stevens Treaties and the construction of the treaties contained in the December 20, 1994, Memorandum Opinion and Order." *United States v. Washington*, No. CV-9213, Sub-proceeding 89-3 (W.D. Wash. Feb. 15, 1995).

As a result, ISCA (Puget Sound) renewed the motion to intervene and WDCFA (coastal waters) sought leave to intervene in the same motion. Mot. for Intervention of Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association, *United States v. Washington*, No. 9213, Sub-proceeding No. CV-89-3 (W.D. Wash. Mar. 16, 1995). Importantly, as the district court noted just three months earlier, the coastal tribes were not previously "*active participants, and they sought no relief.*" *Washington*, 873 F. Supp. at 1427 (emphasis added). App. 51. Accordingly, WDCFA moved to intervene within weeks of these coastal tribes signing on to the pleadings and other stipulations noted *supra*. In the interim, the court had not entered any other substantive order.

On the basis of the written submissions, and without an additional hearing or opportunity to argue, the district court denied both motions to intervene. The district court's express statement that "they may have the right to seek intervention if the *posture of the case changes* in a critical way some time in the future," turned out to be nothing more than an empty promise. Tr. of Ruling at 11-12.

Both ISCA and WDCFA appealed the denial of their motions to intervene. A divided panel of the Ninth Cir-

---

references to "*Amici* App. ——" refer to the Appendix to this *amici curiae* brief.

cuit affirmed that denial on the basis that the motions to intervene were "untimely." *Washington*, 86 F.3d at 1501. The dissent of Judge Kleinfeld put the issue in a different perspective. *Washington*, 86 F.3d at 1507 (Kleinfeld, J., dissenting). The dissent is reproduced as *Amici* App. A at 1a-6a.

Judge Kleinfeld recognized that ISCA and WDCFA were denied the opportunity to participate in a court administered regulatory system that vitally affects the interests of all members:

> The district court regulates the industry in which the proposed intervenors earn their livelihoods. They should be allowed to sit at the table where the compromises are made which will determine whether they can continue to earn an honest living in that industry.

Id. at 1509.

A timely petition for rehearing and suggestion for rehearing *en banc* was filed on the same date. *Washington*, 86 F.3d 1499 (No. 95-35446). That petition was subsequently denied in August, 1996.

In the petition, ISCA and WDCFA maintained that the majority misconstrued a confusing fact situation in reliance on the opinion of the district court. The opinion of the district court was confusing because the court addressed several pending motions for intervention in one order. Unfortunately, this confusion may have been inadvertently perpetuated by ISCA and WDCFA when they agreed to a consolidated oral argument with others in the appeal on the motions to intervene.

In any event, at approximately the same time, ISCA and WDCFA also filed a brief as *amici curiae* in the Ninth Circuit. The Ninth Circuit rejected the arguments (and all others). The district court was affirmed in every significant respect.

D. The Impact of the Decision of the Ninth Circuit Is Substantial.

The decision of the Ninth Circuit in this case effectively awards a guaranteed 50% of all harvestable shellfish species to less than 1% of the resident population of the State of Washington. In practice, at some point in time the inequity will be even more pronounced. In practice, the 50% will be closer to 60% (or even more) because of the self-regulating nature accorded these treaty rights and other uncontrollable management factors. And in practice, only a select few of the tribal members will actually share this largess.

The membership of ISCA has been devastated by the implementation of this decision. A substantial number of WDCFA members are similarly impacted already.

Francis Paul Prucha, who needs no introduction in matters pertaining to federal Indian policies, generally observed, even before the decision in this case:

> The gap is widening, I fear, between solid historical accounts and the pseudo-historical or mythical accounts adopted and proclaimed by many Indians and their white advocates.

Francis Paul Prucha, *The Challenge of Indian History*, Journal of the West, Jan. 1995, at 3.

The decision of the Ninth Circuit significantly widens this gap, albeit unintentionally. The Ninth Circuit has created a chasm that threatens to consume all of the marine creatures in Puget Sound and in the Pacific Ocean along the entire coast of Washington for 200 miles seaward. *See also* Brief of *Amici Curiae* States of Oregon, *et al., United States v. Washington*, No. 98-1026 (U.S. Mar. 1, 1999).[5]

---

[5] The coastal treaty tribes are citing these erroneous decisions in pursuit of even more claims extending far into the 200-mile U.S. Economic Zone in the Pacific Ocean. 61 Fed. Reg. 279 (Jan. 4,

Strict standards of proof regarding treaty time activities have been applied (the correct ones) when tribes resist similar claims of *other* tribes. *United States v. Washington,* 764 F.2d 670, 674 (9th Cir. 1985); *United States v. Washington,* 642 F.2d 1141, 1144 (9th Cir. 1981) *cert. denied,* 454 U.S. 862 (1981). (*See also United States v. Washington,* 730 F.2d 1314, 1318 (9th Cir. 1984)). Certainly, the decision of this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1989), does not support this dual standard. *Fishing Vessel* carefully sets forth the principles and guidelines that should have precluded the Ninth Circuit from accepting the extended claims of the tribes in this case.

Whether the analysis of this Court in *Fishing Vessel* is holding or dicta, in almost all other instances courts have been careful to note that they are:

> [B]ound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when [as here] dictum is of recent vintage and not enfeebled by any subsequent statement.

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13, 14 (1st Cir. 1991).

In this instance, the Ninth Circuit did not adhere to this prudential rule.

1996); 61 Fed. Reg. 28786 (June 6, 1996). And the United States, by the promulgation of emergency regulations, has quickly signed on in support of the tribes' position. The United States Department of Commerce cited the district court's decision to justify "rules" allocating additional new ocean fisheries for "Washington coastal Indian tribes *without any basis in treaty time use.*" An unrelated western Makah boundary of usual and accustomed grounds and stations for salmon was simply "*extended*" south further in the ocean for "three other ocean treaty tribes." 61 Fed. Reg. 279 (Jan. 4, 1996); 61 Fed. Reg. 28786 (June 6, 1996).

Instead, the district court construed *Fishing Vessel* the other way. In more than one instance, the district court summarily and in an inappropriate manner, blurred fundamental issues. Characterizations of this litigation may be as varied as the perspectives from which it is viewed, but one thing is certain. The issues in this case are substantially more than "no brainer" legal issues, as repeatedly stated by the district court at the conclusion of the post-trial proceedings. Any judgment that reflects that point of view is flawed and clearly mistaken. *Fishing Vessel* required more, but the Ninth Circuit did nothing to correct this fundamental misconception.

Lifestyles, livelihoods and the integral nature of many communities in the State of Washington are at stake in this litigation. Nothing in *Fishing Vessel,* including the considered dicta, has been enfeebled by any subsequent statement or case. ISCA and WDCFA (and others similarly situated) should have been secure in the protection afforded by *Fishing Vessel,* where the absence of treaty time use of crab fisheries on the ocean or in deep waters would have demonstrated that such fisheries were not included in the right of "taking fish at all usual and accustomed grounds and stations." None of the equities that led to the treaty allocation of salmon exist for ocean crabbing. The Ninth Circuit opinion turns that justifiable expectation recognized in *Fishing Vessel* on its head.

The result is especially disconcerting for the members of the coastal WDCFA. *After* the August, 1993, "shellfish are fish" order, *after* the January, 1994, order regarding "certain species and *deep-water harvest,*" and right up until the December, 1994, "staked or cultivated" order, the *district court* expressly noted and confirmed that the *coastal* tribes *"were not active participants, and they sought no relief." Washington,* 873 F. Supp. at 1427, n.1 (emphasis added). App. 51.

Nevertheless, the next month after the decision (January, 1995) *coastal* tribes were permitted to sign on to tribal pleadings and enter into stipulations that purportedly establish the same "treaty rights" on the Washington coast, extending *miles* into the Pacific Ocean. Nothing in *Fishing Vessel* or in any other case justifies this kind of revisionism. Members of WDCFA are justified in their belief that they were "sandbagged." "Trial on the implementation issues took place in May, 1995. *No questions regarding crab or other deep-water species or harvests were at issue.*" Br. of Appellee-Plaintiff Tribes at 10, *United States v. Washington,* 86 F.3d 1499 (9th Cir. 1996) (No. 95-35446). Moreover, *no evidence was even offered* as to these ocean fisheries.

REASONS FOR GRANTING THE PETITION

I. THE IMPORTANT QUESTION OF WHETHER THE NINTH CIRCUIT RELIED ON THE WRONG STANDARD OF REVIEW TO DECIDE THE MEANING OF HISTORICAL INDIAN TREATIES SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

The parties in this case have already directed the attention of this Court to this important question. Pet. for a Writ of Certiorari at 28-30, *State of Washington v. United States,* No. 98-1026 (U.S. December 22, 1998); Pet. for a Writ of Certiorari at 11-20, *Puget Sound Shellfish Growers v. United States,* No. 98-1028 (U.S. December 28, 1998); Pet. for a Writ of Certiorari at 24-26, *26 Tideland and Upland Private Property Owners ("UPOW") v. United States,* No. 98-1039 (U.S. Dec. 28, 1998). In addition, the cases cited in the petitions establish that the Ninth Circuit applied the wrong standard of review. The principles set forth in the cases that support this conclusion will not be repeated here.

Rather, ISCA and WDCFA put this argument first to emphasize what is clearly a *compelling* reason to grant review.

This standard of review issue has not only created conflict among the circuits, but it has also caused conflict within the circuits. *Mille Lacs Band v. State of Minnesota,* 124 F.3d 904, 917, 921 (8th Cir. 1997) *cert. granted,* 118 S. Ct. 2295 (No. 97-1337) argued Dec. 2, 1998 (wrong standard). *See also* the pathfinding *en banc* decision in *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984), that the Ninth Circuit ignored. This important question regarding the correct standard of review should be settled by this Court.

II. THE IMPORTANT QUESTION OF WHETHER TRIBES HAVE A RIGHT TO HARVEST DEEP-WATER SHELLFISH AND OTHER SPECIES, KNOWN OR NOT KNOWN AT TREATY TIME, FROM PLACES THAT WERE NOT USED BY TREATY TIME INDIANS FOR SUCH HARVESTING, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

In the process of accepting the tribes' legalistic analysis of treaty language unrelated to any historical perspective, the Ninth Circuit departed from basic tenets in this area of federal Indian law. The Cohen Handbook, ordinarily viewed as a tribal advocacy text, correctly states the controlling principle:

> The allocation of the *right* to take fish in *Fishing Vessel* was *based* on the *understanding* and *intent* of the Indians *and* the United States negotiators at the treaty negotiations. The Indians "*depended* heavily on anadromous fish as a source of food, commerce, and cultural cohesion;" [quoting *Fishing Vessel,* 443 U.S. at 686]

Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) ch. 8, § B3c, at 454 (emphasis added).

The decisions in the Ninth Circuit do not reflect any such understanding and intent. The "right" of taking fish cannot be mechanically expanded and applied to crab, sea urchins, sea cucumbers, or all other species *without* any regard to where tribes historically harvested such species or without any regard to whether such species were, like salmon, vital to the tribes' cultural and economic activity at treaty time.

A separate judicial proceeding was instituted here because the *nature and scope* of that right and *historic use* was *not* readily apparent and a treaty right to particular species was not clearly established in the treaty itself. *See Romero*, 931 F.2d at 624. As the Ninth Circuit explained in a different case involving the interpretation of a treaty:

> [T]he Supreme Court determined the nature of [the salmon fishing] those rights not by parsing the term "in common with," but by examining other words in the Treaty, *their historical context, the practical construction of the right, and the parties' intent.*

Cree v. Waterbury, 78 F.3d 1400, 1404 (9th Cir. 1996) (emphasis added).

In this context, a treaty right to harvest deep-water shellfish from places that were unknown or unused at treaty time is contrary to treaty language as well as the intent and understanding of the treaty negotiators.[6]

The State has set forth in its petition the major points and arguments that clearly show the errors of the Ninth

---

[6] The Ninth Circuit failed to recognize that defining the scope of the treaty right is different from the issue of whether tribes may use modern improvements to harvest shellfish beds that were at one time harvested with ancient technologies. In this respect, we agree with the State that modern techniques may improve on traditional methods, but modern gear does not alter the nature of the treaty or expand it beyond treaty time fishing. The district court made no findings of fact about treaty time deep water shellfish use. *Washington*, 873 F. Supp. at 1430-31.

Circuit with specific reference to the deep water crab and other fisheries. To avoid repetition, ISCA and WDCFA adopt by reference, those arguments and points. Pet. for a Writ of Certiorari, *State of Washington v. United States,* No. 98-1026 (U.S. March 1, 1999).[7]

The State is correct in asserting that the historic harvest of crabs did not occur in the deep waters frequented by ISCA (Puget Sound) and WDCFA (coastal and Pacific Ocean). Indians never customarily harvested these shellfish, and the Ninth Circuit could not, by oversimplification, summarily conclude that areas of salmon fishing rights would, as a matter of law, include any and all shellfish harvests, including crab.

The law of the case itself requires more. Judge Boldt required the tribe to prove:

> The *species taken at treaty times, where* (usual and accustomed grounds), and by *what tribes* (who are entitled to exercise treaty entitlement) . . .

United States v. Washington, 459 F. Supp. at 1038 (W.D. Wash. 1978) (emphasis added).

The tribes could not and did not meet this fundamental burden in the district court. The record is devoid of any such evidence. The Ninth Circuit should not have ignored this fact.

The State and others have made that argument in a convincing fashion. The point that deserves additional attention here involves the coastal waters and the Pacific Ocean: the crab fishery of WDCFA. Had the district court allowed ISCA and WDCFA intervention and a "seat at the table," this issue would have received adequate

---

[7] *See also* the historical arguments in Pet. for a Writ of Certiorari, *26 Tideland and Upland Private Property Owners ("UPOW") v. United States,* No. 98-1039 (U.S. Dec. 28, 1998) that support this position.

consideration. *See* Kleinfeld, J. dissent at *Amici* App. A, 1a-6a. The discussion that follows is intended to insure that this point is not neglected here.

III. THE IMPORTANT QUESTION OF WHETHER ANY USUAL AND ACCUSTOMED GROUNDS AND STATIONS BEYOND THE THREE-MILE LIMIT OF THE TERRITORIAL SEA RECOGNIZED AT TREATY TIME COULD HAVE BEEN ESTABLISHED OR RECOGNIZED BY THE UNITED STATES, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

As noted *supra,* following the district court's December, 1994, opinion, coastal tribes, including the Quileutes and the Hohs, began signing on to tribal pleadings. Previously, as the district court stated in note 1 of that opinion, *"they were not active participants, and they sought no relief." Washington,* 873 F. Supp. at 1427 n.1 (emphasis added). App. 51.

In addition, we have made reference to another coastal tribe, the Quinault Indian Nation, and to the "Stipulation" with the Quinault Indian Nation signed shortly thereafter and filed with the district court. That Stipulation provided that the State and the Quinault Indian Nation would *retrospectively* be "jointly bound by the courts' interpretation of the Stevens' Treaties and the construction of the treaties contained in the December, 1994, Memorandum Opinion and Order."

In the order regarding implementation filed in August, 1995, the district court concluded, without further explanation:

> The Tribes bound by this implementation plan are: Lummi, Nooksack, Upper Skagit, Swinomish, Tulalip, Muckleshoot, Susquamish, Puyallup, Nisqually, Squaxin Island, Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha S'Klallam,

> *Makah, Hoh,* Stillaguamish, Sauk Suiattle and *Quileute.* Other Tribes may become signatories to this Plan by the agreement of all parties to the Plan or by order of the Court.

United States v. Washington, No. CV-9213, Sub-proceeding No. 89-3 (W.D. Wash. Aug. 28, 1995) (Order Re: Implementation of Shellfish Proviso).

Even this paragraph did not include the Quinault Indian Nation and yet they participated in the Ninth Circuit.

In our intervention appeal, the other tribes acknowledged that "the coastal Tribes (Quinault, Hoh and Quileute) did not seek relief in this subproceeding." Br. of Appellee-Plaintiff Tribes at 12, *United States v. Washington,* 86 F.3d 1499 (9th Cir. 1996) (No. 95-35446). This issue is further clouded by the fact that, with the exception of the Makah, coastal tribes did not have any usual and accustomed grounds and stations that extended significantly into the Pacific Ocean. At this point in time, however, the scope of their claims is wholly unrestricted. *See* discussion of Regulations *supra* at n.5. The only thing that emerges from any of this is the scope of the usual and accustomed grounds and stations established for salmon in *Washington,* 730 F.2d 1314 (Makah Pacific Ocean adjudication). Even there, the issue deserves to be revisited.

In the Ninth Circuit, ISCA and WDCFA briefly discussed the Makah tribe's previous claim to the right to take salmon 100 miles off shore in the Pacific Ocean. This isssue was raised in a separate proceeding in *Washington,* 730 F.2d 1314 (Makah). The Makah tribe cited Dr. Lane's account of 100-mile whaling trips in 1897 in support of their claim. The Ninth Circuit rejected that evidence and interpreted the treaty in reliance on what was described as more definite historic use submissions (extending 40 miles off the coast). *Id.*

Even then, the Ninth Circuit failed to address a fundamental concept: the three-mile limit of the territorial sea of the United States recognized at the time of the treaties. *See generally* Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972):

> The three-mile limit under international law can be defined as the *limitation* of the seaward extension of a coastal state's [nation's] territorial jurisdiction at the outer boundary of a zone of water extending three miles from the shore of that state [nation] . . . . in an ancillary context, with *fishing, one of the most important of the reasons that states* [*nations*] *claim territorial seas. Id.* at 7-8, 43 (emphasis added).

Excerpts of this text are reproduced at *Amici* App. B, 7a-11a.

ISCA and WDCFA would respectfully submit that this important factor arguably undermines any recognition of historical usual and accustomed grounds and stations beyond the three-mile limit of the territorial seas recognized at the time of the treaties. (As such, it would appear to be a relevant matter not already brought to the attention of the Court by the parties, within the letter and spirit of S. Ct. Rule 37.1).

For this reason, we think that this fundamental concept and several factors in the Makah litigation should be briefly addressed.

(a) The State of Washington did not actively participate in this Makah controversy. The United States and the Makah tribe appeared to be the "adversaries."

(b) The brief for the United States, filed in the Ninth Circuit at the time, establishes the true nature of this adversarial procedure. Note the following "undisputed" "unchallenged" points:

> The *only* issue in dispute in this proceeding is whether the evidence presented by the Makah Tribe, *all of which was undisputed,* was sufficient to fulfill the tribe's burden of supporting its broad claim. Brief of Plaintiff-Appellee United States of America at 8, *United States v. State of Washington,* No. 83-3802 (9th Cir. Nov. 18, 1983) (second emphasis added).
>
> The purely factual findings recommended by the special master concerning activity of the Makah Indians at and prior to treaty times were *not challenged* and were adopted by the court. . . . The master's report consisted *solely* of his recommended order and he made *no comment* on why he reached any particular conclusion. . . . In summary, however, the *sole* evidence of that issue was the written report and oral testimony of Dr. Barbara Lane. *Id.* at 9 (emphasis added).
>
> [T]hat is irrelevant here because *no challenge* was, or is, made to their demeanor or credibility. *None* of their statements is *disputed* in any way. *Id.* at 12 (emphasis added).

We respectfully submit that these concessions shed light on the adversary process in *Makah.* This is the light in which the issues should be viewed in terms of the crab and other fisheries now at stake in the Pacific Ocean as a result of the decision of the Ninth Circuit below.

(c) The Brief for the United States in the Makah litigation is also significant in one other respect. The United States made no mention of the three-mile limit rule or the role played by that rule in the history and law of the United States—a role especially significant at the time these treaties were negotiated. One would think that some basic reference to this concept would be made in litigation seeking the establishment of "rights" beyond those limits. In the Makah litigation, no one mentioned the three-mile limit rule.

As *Amici* below, we brought the excerpts from the text entitled *The Three-Mile Limit of Territorial Seas* to the attention of the Ninth Circuit. It was our position that a further discussion of this issue (by the *tribe* and the *United States*) would complete the historical perspective. Of course, we really doubted that any response would be forthcoming—at least not in briefs submitted in the Ninth Circuit. No response was forthcoming. The Ninth Circuit never mentioned the issue. *See generally*, Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas*, Annapolis, Maryland: Naval Institute Press, (1972). *See also* excerpts of this text reproduced at *Amici* App. B at 7a-11a.

Beyond question, this rule was part of the "common notions" of United States policymakers in the 1850's. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 151, 206 (1978). It played no role in the Ninth Circuit. Yet the nature and limits of federal power over the three-mile territorial sea should have informed the court when determining what rights were intended by the treaty. It should have confirmed that tribes were not securing rights in fisheries miles off-shore, in crab or other fisheries not previously used by the treaty time Indians.[8]

CONCLUSION

For the foregoing reasons, the Petition should be granted.

---

[8] The discussion in *Fishing Vessel*, 443 U.S. at 690-691 was not directed to this issue. If the three-mile territorial sea issue is not addressed in the brief for the United States, we would respectfully submit that it would be appropriate to invite the Solicitor General to express the views of the United States on this question. At the very least, the Government's "litigating position" should be clearly stated. *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993).

Respectfully submitted,

DANIEL W. WYCKOFF
Attorney at Law
7425 20th Ave. S.E.
Olympia, WA 98503
(360) 456-5865

TOM D. TOBIN
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580-0730
(605) 842-2500
Counsel of Record

Attorneys for Amici Curiae, *Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association*